

REPRESENTATIVE FOR PETITIONER:

Richard Werner, Certified Tax Representative

REPRESENTATIVE FOR RESPONDENT:

Brian A. Cusimano, Attorney

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

GERIATRICS OF INDIANA, INC.,)	Petition No.: 89-007-11-3-4-82249-15
)	
Petitioner,)	Parcel No.: 89-10-20-430-203.000-007
)	
v.)	County: Wayne
)	
WAYNE COUNTY ASSESSOR,)	Township: Center
)	
Respondent.)	Assessment Year: 2011

Appeal from the Final Determination of the
Wayne County Property Tax Assessment Board of Appeals

December 28, 2017

FINAL DETERMINATION

The Indiana Board of Tax Review (Board), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUE

1. Did the Petitioner prove the subject property's 2011 assessment is incorrect?

PROCEDURAL HISTORY

2. The Petitioner initiated a 2011 assessment appeal by filing a Petition for Correction of an Error (Form 133) with the Wayne County Auditor on August 31, 2014. On March 3,

2015, the Wayne County Property Tax Assessment Board of Appeals (PTABOA) issued its determination denying the Petitioner any relief. On April 13, 2015, the Petitioner filed an appeal with the Board.¹

3. On September 29, 2017, the Board's administrative law judge (ALJ), Joseph Stanford, held a hearing on the petition. Neither the Board nor the ALJ inspected the subject property.

HEARING FACTS AND OTHER MATTERS OF RECORD

4. Certified tax representative Richard Werner appeared for the Petitioner and was sworn as a witness. Attorney Brian Cusimano appeared for the Respondent.²
5. The Petitioner offered the following exhibits:

Petitioner Exhibit 1:	Petitioner's list of exhibits; summary of the Petitioner's contentions; aerial photographs of the subject property; Mr. Werner's 2011 cost approach calculations,
Petitioner Exhibit 2:	2011 subject property record card,
Petitioner Exhibit 3:	2008 subject property record card,
Petitioner Exhibit 4:	2009 subject property record card,
Petitioner Exhibit 5:	Letter from Gene Kates to Richard Werner, dated February 16, 2017,
Petitioner Exhibit 6:	2011 property record card for Forrest Park Nursing Home,
Petitioner Exhibit 7:	2011 property record card for Arbor Trace Nursing Home,
Petitioner Exhibit 8:	2011 property record card for Golden Rule Nursing Home,
Petitioner Exhibit 9:	2011 property record card for Oakridge Nursing Home,
Petitioner Exhibit 10:	2011 property record card for Heritage House Nursing Home,
Petitioner Exhibit 11:	2011 property record card for Rosebud Village Nursing Home.

¹ The Petitioner filed its appeal with the Board via a Petition for Review of Assessment (Form 131). That petition is used in the Form 130/131 procedure which, among other differences from the Form 133 procedure, is only available to challenge the current year's assessment and must be filed by a specific deadline. Here, the underlying 2011 appeal was filed at the local level on August 31, 2014, via a Form 133. The Petitioner cannot avoid the statutory time limitations associated with the Form 131 review process by filing its claim on a Form 133. See *Williams Indus. v. State Bd. of Tax Comm'rs*, 648 N.E.2d 713, 718 (Ind. Tax Ct. 1995) (stating that because the legislature has created specific appeal procedures, a taxpayer must comply with the statutory requirements of filing the proper petitions within a timely manner). See also *Lake Co. Prop. Tax Assessment Bd. of Appeals v. BP Amoco Corp.*, 820 N.E.2d 1231, 1236-1237 (Ind. 2005) (stating that because the taxpayer failed to challenge its assessments within the applicable time period for which a Form 130 was available, it was foreclosed from using a Form 133 for that purpose). Accordingly, the Petitioner has constructively filed a Form 133 with the Board.

² Edward O. Martin, Joseph L. Kaiser, Betty Smith-Henson, Denise Praul, and Bryan L. Hisle were also present at the hearing but were not sworn and did not testify.

6. The Respondent did not offer any exhibits.
7. The following additional items are recognized as part of the record:
 - Board Exhibit A: Form 131 and Form 133 petitions with attachments, including Power of Attorney for Richard Werner,³
 - Board Exhibit B: Hearing notice dated August 16, 2017,
 - Board Exhibit C: Hearing sign-in sheet,
 - Board Exhibit D: Notice of Appearance and Notice of Change of Address for Brian Cusimano.
8. The subject property is a nursing home located at 705 East Main Street in Centerville.
9. The PTABOA determined the 2011 total assessment is \$2,545,000 (land \$115,200 and improvements \$2,429,800).
10. The Petitioner requested a total assessment of \$2,361,900 (land \$115,200 and improvements \$2,246,700).

OBJECTIONS

11. Mr. Cusimano objected to Petitioner's Exhibits 1 and 5 along with Mr. Werner's accompanying testimony on the grounds that it is hearsay. Specifically, Mr. Cusimano argued the portion of Petitioner's Exhibit 1 referring to "conversations with Denna Masters" and Mr. Werner's related testimony is hearsay because Ms. Masters was not present to be cross-examined. Similarly, Mr. Cusimano objected to Petitioner's Exhibit 5 and Mr. Werner's related testimony because Mr. Kates was also not present to be cross-examined. Mr. Werner did not offer a response to the objections. The ALJ took the objections under advisement.

³ The Petitioner also submitted a "Property Tax Assessment Appeal Report" along with its filings. This report was prepared by Mr. Werner and is dated August 31, 2014. On its face, this report includes similar cost information as Petitioner's Exhibit 1. However, upon further inspection the two reports are markedly different. Most importantly, the report attached to the filing specifically states it was prepared in accordance with Uniform Standards of Professional Appraisal Practice (USPAP) and lists Mr. Werner's accreditation. Petitioner's Exhibit 1 states neither. The Board will not speculate as to why Mr. Werner did not include this crucial information in Petitioner's Exhibit 1. As the Petitioner did not introduce into evidence the report attached to the filing nor did Mr. Werner testify to anything in the report, the Board will not place any weight on this report.

12. “Hearsay” is a statement, other than one made while testifying, that is offered to prove the truth of the matter asserted. Such a statement can be either oral or written. (Ind. R. Evid. 801(c)). The Board’s procedural rules specifically address hearsay evidence:

Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If not objected to, the hearsay evidence may form the basis for a determination. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay evidence.

52 IAC 3-1-5(b). The word “may” is discretionary, not mandatory. In other words, the Board can permit hearsay evidence to be entered in the record, but it is not required to allow it.

13. Petitioner’s exhibit 1 includes hearsay evidence. Similarly, Petitioner’s exhibit 5 is hearsay. Mr. Werner’s testimony related to these exhibits is also hearsay. While the exhibits and the accompanying testimony does nothing to either prove or disprove the subject property’s market value-in-use, they are admitted. However, because the Respondent properly objected, these items cannot serve as the sole basis for the Board’s decision.

JURISDICTIONAL FRAMEWORK

14. The Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property, (2) property tax deductions, (3) property tax exemptions, and (4) property tax credits that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Ind. Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

PETITIONER'S CONTENTIONS

15. The assessment of the subject property includes several errors. The property was renovated in 2008 and the property record card fails to accurately reflect the changes made. *Werner argument: Pet'r Ex. 1.*
16. First, a "lean-to" that no longer exists is still being assessed. The 2011 property record card includes an assessment for a lean-to built in 1960 with a true tax value of \$300.⁴ However, an aerial photograph indicates this lean-to no longer exists on the property. According to Ms. Masters, the "administrative manager" of the facility, this lean-to was torn down "several years ago." *Werner testimony; Pet'r Ex. 1, 2.*
17. Second, during the 2008 renovation, some office space was moved and as a result some areas are incorrectly classified on the property record card. More specifically, "the 6,210 square feet of apartment space did not exist" and according to Ms. Masters "the apartments were previously in a separate building and were converted to nursing home space six years earlier when the buildings were connected." Admittedly, Mr. Werner stated there is "not a whole lot of difference between nursing home space and assisted living space." As a result of the renovation, 8,756 square feet of building space was added and 6,061 square feet of the addition was incorporated into office space. *Werner testimony; Pet'r Ex. 1, 2.*
18. Further, the property record card incorrectly lists 6,110 square feet of office space on the first floor. The first floor only has 1,477 square feet of office space. Additionally, the property record card lists 1,354 square feet of office space in the basement. This is incorrect because the basement was converted to utility storage. Finally, the property record card erroneously lists 1,314 square feet of nursing home space on the second floor. However, an elevator is required to have nursing home space anywhere other than the

⁴ The Board notes in addition to the lean-to built in 1960, the subject property record card also lists another lean-to built in 1980 with a true tax value of \$700. Because Mr. Werner's "revised assessment" still includes this 1980 lean-to, the Board can only assume this lean-to was still present on the property as of March 1, 2011.

ground floor and because there is no elevator the second floor area is “obsolete.”⁵

Werner argument; Pet’r Ex. 1, 2.

19. Mr. Werner spoke with Ms. Masters on June 13, 2014, regarding the renovation and resulting changes to the property. Also, Gene Kates, the Centerville Building Commissioner, was in email communication with Mr. Werner confirming that a permit was issued in May 2008 for remodeling, and an occupancy permit was issued in January 2009 upon completion of the remodeling. Mr. Werner admitted he inspected the property for the first time in 2014. *Werner testimony; Pet’r Ex. 1, 5.*

20. Wayne County has six other nursing home properties and according to their assessments, office space is combined with nursing home space when features such as wall type and wall height are the same. The subject property should be assessed similarly “in the interest of uniformity and equality.” If all of these inaccuracies were applied to the 2011 assessment, the resulting improvement assessment would be \$2,246,700. Although Mr. Werner did concede “it’s possible” the current assessment is what the property is worth. *Werner argument; Pet’r Ex. 1.*

RESPONDENT’S CONTENTIONS

21. The Petitioner’s appeal is not appropriate via a Form 133 because it requires subjective judgment. The issues the Petitioner raised require more than “a simple true or false finding of fact.” *Cusimano argument.*

22. Assessing property is not “a simple mathematical exercise.” Whether an area should be assessed as nursing home, assisted living, or apartment is not a simple question. It requires subjective judgment. Additionally, what constitutes office space may also require subjective judgment. *Cusimano argument.*

⁵ While Mr. Werner used the term “obsolete,” he did not argue that any additional depreciation should be applied to the assessment. In fact, in his “revised assessment,” he applied the same depreciation percentages as the Assessor for all the buildings.

23. In this case, the Petitioner has “questioned the process and the property record card.” Thus, the Petitioner has essentially attacked the Assessor’s methodology. However, “a technical failure to comply with the procedures set forth in the Guidelines’ cost approach does not render an assessment invalid as long as the individual assessment is a reasonable measure of true tax value.” *Cusimano argument* (citing *WC Middletown LLC v. Henry Co. Ass’r*, Ind. Bd. of Tax Rev. Pet. No. 33-006-14-3-4-20421-15 (July 11, 2017); *Eckerling v. Wayne Twp. Ass’r*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006); *Kooshtard Property VI, LLC v. White River Twp. Ass’r*, 836 N.E.2d 501, 506 (Ind. Tax Ct. 2005)).
24. Finally, the Petitioner’s “whole case is based on hearsay.” Mr. Werner did not inspect the property in either 2008 or 2011, so there is no evidence, other than hearsay, as to “what was there” on March 1, 2011. *Cusimano argument*.

ANALYSIS⁶

25. Here, the Petitioner seeks to correct alleged errors in the subject property’s 2011 assessment via a Form 133, which the Department of Local Government Finance (DLGF) has prescribed for use in the correction of error process under Ind. Code § 6-1.1-15-12. But only objective errors that can be corrected with exactness and precision can be addressed with a Form 133. These forms are not for changes that require subjective judgment. Ind. Code § 6-1.1-15-12; *O’Neal Steel v. Vanderburgh Co. Property Tax Assessment Bd. of Appeals*, 791 N.E.2d 857, 860 (Ind. Tax Ct. 2003); *Barth Inc. v. State Bd. of Tax Comm’rs*, 756 N.E.2d 1124, 1128 (Ind. Tax Ct. 2001); *Bender v. State Bd. of Tax Comm’rs*, 676 N.E.2d 1114 (Ind. Tax Ct. 1997); *Reams v. State Bd. of Tax Comm’rs*, 620 N.E.2d 758, 760 (Ind. Tax Ct. 1993); *Hatcher v. State Bd. of Tax Comm’rs*, 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990).
26. A determination is objective if it hinges on simple, true or false findings of fact. *See Bender*, 676 N.E.2d at 1115. “[W]here a simple finding of fact does not dictate the result

⁶ As previously explained, the Petitioner has constructively filed a Form 133 with the Board. The challenge of a property’s value is not available via a Form 133. Accordingly, the burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply and the burden rests with the Petitioner.

or discretion plays a role, [the] decision is considered subjective and may not be challenged through a Form 133 filing.” *Id.*

27. In this case, the Petitioner has raised three separate, distinct issues. First, the Petitioner, in essence, argued the Assessor failed to assess certain areas of the facility using the proper pricing models. Second, the Petitioner argued that the Assessor’s failure to use the proper pricing models resulted in a lack of uniformity and equality in the assessment. Third, the Petitioner argued that a lean-to should be removed from the assessment.
28. As to whether the Assessor used the proper pricing models, the Petitioner’s evidence is entirely hearsay. Because the Respondent properly objected to the hearsay, the statements from Ms. Masters and Mr. Kates, the Board cannot rely solely on that evidence in making a determination. *See* 52 IAC 3-1-5(b). Mr. Werner, the Petitioner’s only witness, did not inspect the property until 2014 and the Petitioner failed to offer any other evidence regarding this issue to the Board.
29. Moreover, subjective judgment is required to select pricing models, as it involves a judgment by the assessor based on the characteristics of the property. Certainly, there can be times when the correct selection appears somewhat obvious, and much less judgment is required. But clearly, even in those instances, the selection of one of many pricing models, performed while comparing the salient features of the property to the features associated with the respective models, involves more than just a simple finding of fact. Here, as Mr. Werner’s testimony illustrates, judgment is involved, for example, in determining whether an area is more appropriately assessed as a nursing home or an assisted living facility, or whether an office area should be combined with nursing home space in an assessment.
30. Further, the determination of which pricing model to use does not fall into any of the categories contemplated in Ind. Code § 6-1.1-15-12. And the Tax Court has explicitly stated that an assessor must use subjective judgment to determine which pricing model to

employ. *See Bender*, 676 N.E.2d at 1116; *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890, 894 (Ind. Tax Ct. 1995).

31. The Petitioner also offered property record cards for six other nursing homes in Wayne County, arguing that the Assessor included office space with the nursing home space in those assessments. The Petitioner argued that the Assessor's failure to follow the same methodology in assessing the subject property resulted in assessments that lack uniformity and equality.

32. While it related to the land assessment, a similar claim about lack of uniformity and equality was rejected in *Westfield Golf Practice Center, LLC v. Washington Twp. Assessor*, 859 N.E.2d 396 (Ind. Tax Ct. 2007). Westfield Golf based its argument on the fact that the landing area for its driving range was assessed by using a different base rate than the rate used to assess the landing areas of other driving ranges. *Id.* at 397-98. That difference, however, did not establish a violation of uniformity and equality requirements. The court explained that "the overarching goal of Indiana's new assessment scheme is to measure a property's value using objectively verifiable data." *Id.* at 399. Thus, while uniformity and equality is required in the end result, the procedures used to arrive at that result need not be uniform. Rather than focusing on that end result by comparing the actual market value-in-use of its property to the market values-in-use of the other driving ranges, Westfield Golf focused solely on the methodology used to compute the assessments. Westfield Golf did not prove the actual market value-in-use of its property or the other properties. Lacking such proof, there was no evidence that the requirements for uniformity and equality of assessment were violated. *Id.*

33. In the case at hand, rather than land base rates, the Petitioner focused on a difference in how the pricing models were applied. The Petitioner never addressed whether the subject property was assessed at a higher percentage of market value-in-use than the other properties. Indeed, the Petitioner only noted the properties are nursing homes in Wayne County. Based on the record, there is no way to draw any legitimate conclusion about the

assessed value or the market value-in-use of the subject property and the other nursing homes. *See Long v. Wayne Twp. Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005) (stating that one who offers a comparable is responsible for explaining the characteristics of the subject property, how those characteristics compare to those of purportedly comparable properties, and how any differences affect the relevant market value-in-use of the properties).

34. Making a determination about the alleged violation of uniformity and equality principles necessarily requires comparing the valuation of properties, and a legitimate comparison inherently requires subjective judgment to account for similarities and differences between properties. Attempting to bring this claim is inconsistent with the general limitation that Form 133s are limited to objective errors that can be corrected without subjective judgment.
35. Finally, the Petitioner claims a lean-to built in 1960 with a true tax value of \$300 no longer exists. Regarding this alleged error, the Petitioner relied on more than just hearsay evidence. The Petitioner also offered a 2011 aerial photograph showing the lean-to no longer exists on the property. Additionally, the Respondent failed to impeach or rebut the evidence or offer any proof the lean-to is still located on the property.
36. Whether or not a lean-to existed on the property as of March 1, 2011, is a simple finding of fact that does not require subjective judgment. Because the Respondent did not rebut the Petitioner's evidence, the Board orders the non-existent lean-to be removed from the property record card.

SUMMARY OF FINAL DETERMINATION

37. The Board finds for the Respondent on all of the issues except the non-existent lean-to. Accordingly, the non-existent lean-to must be removed from the property record card.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date first written above.

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days of the date of this notice. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.